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No. 74-5968

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN A. GEDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JOHN P. RUPP,
Assistant to the Solicitor General,

SIDNEY M. GLAZER,
VICTOR STONE,
LAUREN S. KAHN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 502 F. 2d 1 (App. 24-40).[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on October 7, 1974. A petition for

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[1] "Tr." refers to the transcript of the proceedings in the district court involving petitioner and co-defendant Fink. "App." refers to the Joint Appendix filed with this Court.

rehearing was denied on December 6, 1974 (Pet. App. C). On January 9, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 4, 1975. The petition was filed on that date, and was granted on April 21, 1975 (App. 41). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's limitation of discussions between petitioner and his counsel, during an overnight recess after completion of petitioner's direct examination, to a conference to discuss trial strategy and a prohibition of discussion of petitioner's testimony, requires the reversal of petitioner's conviction, where there has been no showing that the limitation prejudiced petitioner.[2]

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner

[2] This is a restatement of the first question presented, to which the Court limited the grant of the petition.

and co-defendant Michael Fink were convicted of conspiracy to import and illegal importation of marijuana into the United States, in violation of 18 U.S.C. 371 and 21 U.S.C. 952(a), and possession of marijuana, in violation of 21 U.S.C. 841(a)(1).[3] Petitioner was sentenced to concurrent three-year terms of imprisonment (App. 4-5). The court of appeals affirmed (502 F. 2d 1; App. 24-40).

1. The evidence showed that petitioner and co-defendant Fink conspired with seven other persons to smuggle approximately 1,000 pounds of marijuana into the United States from Columbia. The conspiracy began in early September 1972, when petitioner, Fink and William Rand ("Randy") Kilgore[4] met and agreed jointly to undertake such a venture (Tr. 56-58, 255-257, 264-267). Petitioner promised to secure access to a supply of marijuana in South America, Fink promised to find the necessary financial backing, and Kilgore agreed to make arrangements with a pilot able and willing surreptitiously to fly a large quantity of marijuana into the United States (Tr. 57-59).

Fink experienced little difficulty in convincing James Mahoney and Tom Waddington to join the venture and to supply the necessary capital (Tr. 61-

[3] The petition for a writ of certiorari filed by co-defendant Fink was denied on April 14, 1975. *Fink* v. *United States*, No. 74-820.

[4] Kilgore testified at trial for the government after having pleaded guilty to conspiracy to import marijuana (App. 29; Tr. 123-124).

62, 66-69).[4] Kilgore had somewhat more trouble finding a pilot, but after a few false starts he located David Butler through a contact in New York (Tr. 64). Butler had access to an airplane, and he agreed to make a round-trip flight to Colombia for a $10,000 fee plus expenses and one hundred pounds of marijuana (Tr. 65, 115). Three additional persons also joined the venture as it took shape, agreeing to participate in the transportation and distribution of the marijuana after it had been brought to the United States (Tr. 77-79, 247-250, 265-267).

At some point prior to the time Butler was scheduled to fly to Colombia to pick up the marijuana, Kilgore developed reservations concerning Butler's allegiance. He therefore called his contact in New York and asked "what the story [was] on" Butler. Kilgore was informed that Butler "wasn't the heat" (that is, a law enforcement officer) but that he had "ripped off some people for $10,000" by taking their money and not delivering the marijuana he had agreed to transport. On the basis of this information, petitioner, Kilgore and Fink decided that petitioner would carry Fink's revolver on the flight from Colombia "to take care of the pilot if anything went wrong" (Tr. 70-71).[6]

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[5] Mahoney was tried separately, and was convicted of the same offense as petitioner. Waddington died prior to petitioner's trial (App. 29; Tr. 1268).

[6] Petitioner was also charged with illegal possession of Fink's revolver, but the charge was dismissed at trial, with the government's acquiescence, because of the absence of any evidence that petitioner actually had carried the weapon during the smuggling operation (Tr. 670-671).

On November 26, 1972, petitioner, Butler and Mahoney boarded the airplane Butler had rented and took off for Colombia (Tr. 72, 283). On the return, Butler landed the plane at an abandoned housing project located near Tampa, Florida (Tr. 73-74, 276-279). The conspirators thereupon transferred the marijuana from the plane to a camper truck (Tr. 74, 279). The camper truck, escorted by Kilgore, Fink and Waddington, was then driven from the site and the plane, occupied by Butler, petitioner and Mahoney, took off for Tampa (Tr. 74-75, 280-282).

Kilgore's reservations about Butler proved to be well founded. Approximately two weeks prior to the flight to Colombia to pick up the marijuana, Butler had informed the United States Customs Service of the smuggling conspiracy (Tr. 1049).[7] On the basis of Butler's tip, agents of the Customs Service maintained a lookout at the appointed landing site, and they observed the transfer of the marijuana from the plane to the camper truck and the subsequent dispersion of the conspirators. All of the conspira-

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[7] In return for this information, Butler was permitted to retain the $10,000 he had been paid for making the flight (Tr. 1052). Butler was later charged with illegal possession of marijuana, however, after it was discovered that he had also kept and sold fifty pounds of the marijuana he had transported from Columbia to the United States (Tr. 1058). This charge was dismissed at the beginning of petitioner's trial (App. 29).

tors were arrested shortly thereafter (Tr. 280-281, 504-507, 529-530, 536-537, 577-580).

2. Petitioner's testimony at trial was that he had been entrapped into committing the offenses. He testified that his frequent conversations about marijuana smuggling with Kilgore and a friend living in Colombia, whom he visited in October 1972 and from whom the marijuana eventually was obtained, were initiated by those persons rather than by him (Tr. 1266-1271). He also testified that he had not actually joined the conspiracy until induced to do so by Butler (Tr. 1283-1284).

In response to questions obviously designed to establish his predisposition to commit the offenses charged, petitioner admitted on cross-examination that he had been aware in early 1972 that his South American business partner in a store selling stereo equipment was a big dealer in narcotics (Tr. 1232-1233). He also admitted that on two occasions he had carried approximately $100,000 in cash to New York for his business partner in order to exchange the cash for bills of large denominations (Tr. 1263-1265).

In rebuttal to petitioner's testimony, Kilgore testified for the government that in November 1972 petitioner had given him 8 to 10 grams of cocaine to sell on consignment and that on two occasions, between September and November 26, 1972, he had sold heroin to petitioner (Tr. 1381-1383).

2. At the conclusion of the direct examination of petitioner, the court noted that it was 4:55 p.m. and

asked counsel for co-defendant Fink and the Assistant United States Attorney whether they wished to continue or to have a recess declared to the following day. Fink's attorney stated that he did not intend to ask petitioner any questions; the Assistant United States Attorney stated that he preferred to defer his cross-examination of petitioner until the next morning (Tr. 1147-1148; App. 16-17). The court thereupon excused the jury and, pursuant to a request by the government, instructed petitioner "not to discuss [his] testimony in this case with anyone until [he returned the next morning] at 9:30 for the purpose of being cross-examined" (Tr. 1153; App. 20).

When petitioner's attorney objected to this instruction, the court noted that but for the fortuity of the recess there would have been no opportunity for consultation prior to the cross-examination of petitioner. The court asked petitioner's attorney whether petitioner would have been entitled to a recess in order to permit consultation prior to his being tendered for cross-examination. Petitioner's attorney responded that petitioner did not have a right to a recess for that purpose. He also stated that even though he had no right "to coach [petitioner] as to what he may say on cross-examination or how to answer questions," he had a right under the circumstances to confer with petitioner concerning such things as trial strategy and the order of witnesses (Tr. 1149-1152; App. 17-19).

The court agreed, but stated that because it seemed unlikely that petitioner would be able to con-

form to the court's and counsel's mutual understanding of the matters that properly could be discussed prior to cross-examination, he would grant petitioner an immediate opportunity to confer with his attorney concerning trial strategy but would prohibit all further overnight conversation (Tr. 1152-1153; App. 19). The court also assured petitioner's attorney that after re-direct examination of petitioner had been concluded he would be given whatever time he felt was needed to confer with petitioner (Tr. 1153; App. 19).[a]

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[a] In announcing its ruling on this point, the court stated in pertinent part (Tr. 1152-1153; App. 19):

> [Y]our client, as far as I know, has not had any legal training; and I don't know anything about him other than what I have heard here today. And I don't know that he is subject to that same instruction—that he would understand it.
>
> I think he would understand it if I told him just not to talk to you; and I just think it is better that he not talk to you about anything.
>
> * * * *
>
> Let's put it this way. You ask him right now if he thinks there are any witnesses you ought to call during the evening. If anything comes up after he has been cross-examined, and after you have had an opportunity for redirect, we would have a recess and you would have all the time you need to talk to him about strategies or anything else. We will take the rest of this month, if necessary, to give you an opportunity and him an opportunity for a fair trial. But we are not going to let strategy take the place of this situation.

The record does not disclose whether petitioner took advantage of the opportunity to have an immediate conference with his attorney.

When the court reconvened the following morning, petitioner's attorney requested that he be permitted to reopen direct examination of petitioner. The court granted this request (Tr. 1164; App. 20-21). After the Assistant United States Attorney had completed his cross-examination, petitioner's attorney objected to a proposed instruction prohibiting him from consulting with petitioner during a luncheon recess immediately prior to the beginning of re-direct examination. Again, petitioner's attorney conceded that he would not have had an opportunity to confer with petitioner but for the fortuity of the recess. The court permitted petitioner and his attorney to confer during the recess, however, after having observed again that petitioner did not have an absolute right to confer with his attorney during the period of his examination (Tr. 1335-1336; App. 22-23).

3. In affirming petitioner's conviction, the court of appeals noted (App. 38) that petitioner had not attempted to show that the instruction prohibiting consultation during the bulk of the recess between his direct and cross-examination had prejudiced his right to a fair trial. Relying upon the Second Circuit's decision in *United States* v. *Leighton*, 386 F. 2d 822, certiorari denied, 390 U.S. 1025, the court of appeals held that the disputed instruction did not rise to the level of reversible error "[b]ecause * * * 'we can discern no actual harm * * * and are convinced that there was none' " (App. 39-40).

SUMMARY OF ARGUMENT

The claim made in this case is that a particular restriction upon consultation between petitioner and his attorney during trial requires, without more, the reversal of petitioner's conviction. Petitioner does not contend that he suffered actual prejudice as a result of the restriction and, as we shall demonstrate, the record of this case affords no basis for assuming prejudice.

Petitioner's contention that he is nonetheless entitled to have his conviction reversed fundamentally misconceives the nature of the adversary factfinding process constitutionalized in the Sixth and Fourteenth Amendments. More specifically, it ignores the fact that once a person has been accused of a criminal offense he becomes subject to a variety of restrictions that necessarily limit the opportunities he otherwise would have to consult with his attorney and to assist generally in the preparation of his defense. The range of these concededly valid restrictions increases significantly once the trial has begun, and is greatest when the defendant has elected to testify at trial and is on the stand.

The narrow limitation the district court imposed upon petitioner's consultation with counsel is not unlike the numerous restrictions to which all criminal defendants are necessarily subject. Consequently, we submit that a finding of prejudice *per se* is inappropriate in this case. We submit further that since petitioner has not pointed to any actual prejudice

that he suffered as a result of the restriction at issue here, the court of appeals properly affirmed his conviction.

ARGUMENT

THE DISTRICT COURT'S LIMITATION OF DISCUSSIONS BETWEEN PETITIONER AND HIS COUNSEL, DURING THE OVERNIGHT RECESS FOLLOWING COMPLETION OF PETITIONER'S DIRECT TESTIMONY, TO A CONFERENCE TO DISCUSS TRIAL STRATEGY AND PROHIBITION OF DISCUSSION OF PETITIONER'S TESTIMONY, DOES NOT REQUIRE THE REVERSAL OF PETITIONER'S CONVICTION

This case presents a narrow question involving the application of the Sixth Amendment's right to assistance of counsel. Petitioner had counsel at all critical stages of the proceedings against him, and there is no claim that the assistance his counsel furnished him was inadequate. The issue is whether the district court's limitation of petitioner's consultation with counsel, during an overnight recess between petitioner's direct testimony and cross-examination, to a discussion at the beginning of the recess of trial strategy and the prohibition of discussion of petitioner's direct testimony, automatically requires the reversal of petitioner's conviction, even though petitioner has not shown that he suffered any prejudice from the limitation.

In some situations, limitation of the right to counsel has been held without more to require reversal of a conviction. See *infra*, pp. 13-14. In other contexts, however, the limitation has either been held to be proper or the validity of the conviction has turned

upon whether the limitation was prejudicial or merely harmless error. See *infra*, pp. 14-22. As we show below, the limitation in this case is of the kind for which the doctrine of harmless error is appropriate; under that doctrine the court of appeals properly upheld petitioner's conviction because petitioner did not show that the limitation upon consultation with his counsel denied him a fair trial or otherwise prejudiced him.

A. The narrow limitation the district court imposed upon petitioner's consultation with counsel does not call for reversal of petitioner's conviction in the absence of a showing of prejudice.

The cases in which this Court has held that violations of constitutional rights automatically require reversal of a conviction without any inquiry into whether the violations were prejudicial to the defendant are of two categories. The first category has involved the deprivation of a right either so basic to a fair trial or with respect to which resulting prejudice—even if present—would have been so difficult to demonstrate, that the existence of prejudice could not reasonably or fairly be denied.[9] The second category has involved such gross official misconduct

[9] Examples include cases in which jurors have been exposed to publicity highly adverse to the defendant (*e.g.*, *Sheppard* v. *Maxwell*, 384 U.S. 333, 351-352) and cases in which the defendant's conviction may have rested on a constitutionally-impermissible ground (*e.g.*, *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 292).

that a conviction tainted by that misconduct should not be permitted to stand.[10]

Where there has been an actual denial of counsel —either totally or at a particular critical stage of the proceedings—that ordinarily requires a reversal of a conviction without regard to whether prejudice has been shown. *E.g.*, *Argersinger* v. *Hamlin*, 407 U.S. 25; *Gideon* v. *Wainwright*, 372 U.S. 335; *Johnson* v. *Zerbst*, 304 U.S. 458; *Powell* v. *Alabama*, 287 U.S. 45. Compare *Milton* v. *Wainwright*, 407 U.S. 371, and *United States* v. *Wade*, 388 U.S. 218, with *White* v. *Maryland*, 373 U.S. 59, and *Hamilton* v. *Alabama*, 368 U.S. 52. The basic premise underlying these decisions is that the assistance of counsel is so basic to a fair trial that actual prejudice need not be demonstrated, but will be assumed, if the denial of counsel was both absolute and occurred at one or more stages of the proceedings potentially critical to a successful defense. As stated in *Gideon* v. *Wainwright*, *supra*, 372 U.S. at 344:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. * * * That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread be-

[10] Examples include egregious prosecutorial misconduct (cf. *Berger* v. *United States*, 295 U.S. 78, 84-89) and use of an involuntary confession (*e.g.*, *Lynumn* v. *Illinois*, 372 U.S. 528, 537; *Spano* v. *New York*, 360 U.S. 315, 324).

lief that lawyers in criminal courts are necessities, not luxuries. * * *

Where, however, the alleged denial of the right to counsel is based upon limitations on consultation between the defendant and counsel, different policy considerations are involved. As developed below, the very nature of the criminal process unavoidably imposes some restrictions upon a defendant's access to counsel and his participation with counsel in preparing and handling his case. Petitioner's claim that he is entitled to the reversal of his conviction solely on the basis of the limitation the district court imposed upon the discussion of his testimony with his counsel during the overnight recess interrupting his examination, without showing that the limitation prejudiced the defense of his case, ignores "the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments" (*Herring* v. *New York*, No. 73-6587, decided June 30, 1975 (slip op., p. 5).[11]

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[11] The instruction to petitioner that he was not to discuss his testimony with his counsel during the overnight recess between his direct and cross-examination was consistent with the court's efforts throughout the trial to prevent the possible tailoring of testimony. Other witnesses generally were not permitted to be present in the courtroom except when they were testifying, and they were instructed not to discuss the case with anyone outside the courtroom, other than attorneys representing the government or the defendants (Tr. 8). Whenever the testimony of a witness was interrupted by a recess, the court routinely advised the witness not to speak with anyone during the recess (Tr. 124, 177, 318, 435, 471, 999; App. 6-9, 11-12, 13). At the request of petitioner's attorney,

When a person is formally charged with crime, the law frequently subjects him to restrictions which inevitably somewhat limit his ability to consult with counsel and to prepare his defense. If the defendant is incarcerated prior to trial, his confinement necessarily limits to some extent consultation with counsel and prevents him from himself seeking out witnesses or developing evidence. When the defendant is released on bail or on his own recognizance, he frequently is subject to travel or other restrictions. Although these restrictions may somewhat limit the defendant's ability to consult with counsel, they have been consistently upheld as long as they have not precluded adequate pretrial preparation and have been justified by other recognized policies, such as the need to maintain prison security and order, and to ensure the presence of the defendant at trial.[12]

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even the government's chief investigatory agent was prohibited not only from participating in but also from attending conferences with other government witnesses (Tr. 840-841; App. 12).

In contrast to the limitations the court placed upon consultation between witnesses and attorneys during a witness' testimony, the court freely granted recesses when requested (Tr. 1041-1042, 1076-1077; App. 13-14, 16) and repeatedly granted defense motions to reopen the examination of witnesses that had been concluded before the recesses (Tr. 180-184, 1163-1164; App. 20-21).

[12] See, *e.g.*, *Via* v. *Cliff*, 470 F.2d 271 (C.A. 3) (in order to establish an infringement of his constitutional right to counsel, the plaintiff was required to prove in an action under 42 U.S.C. 1983 that the restrictions placed by prison officials upon conferences with his attorney were either wrongfully motivated

In the criminal trial itself, there are also significant restrictions upon the defendant's right to consult with counsel and, indeed, upon counsel's activities themselves. As this Court noted in *Quercia* v. *United States*, 289 U.S. 466, 469, "[i]n a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the pur-

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or unnecessary to maintain prison security and order); *United States* v. *Gordon*, 455 F.2d 398 (C.A. 8) (the defendant was not deprived of the effective assistance of counsel because his attorney was denied admittance to the jail in which he was incarcerated on the day before trial, since the trial court permitted adequate time for consultation prior to trial and the defendant failed to establish prejudice); *United States* v. *Hughes*, 429 F.2d 1293 (C.A. 10) (transfer of the defendant from the place of trial to a federal prison where he was allegedly unable to confer with his attorney did not deprive the defendant of the effective assistance of counsel on appeal, since the defendant was not transferred until ten days after the verdict was returned and he failed to show that his attorney was incompetent or lacked diligence); *Krull* v. *United States*, 240 F.2d 122 (C.A. 5), certiorari denied, 353 U.S. 915 (where the defense was not hampered by the presence of an officer at conferences in prison between the defendant and his attorney, there was no denial of the defendant's right to the assistance of counsel); *United States* v. *White*, 295 F. Supp. 893 (N.D. Ga.) (the fact that the defendant was forced to confer with his attorney in a crowded visiting room was not grounds for dismissal of indictment); *Smith* v. *Peyton*, 276 F. Supp. 275 (W.D. Va.) (the fact that a prison officer was present in the conference room in which the defendant conferred with his attorney before trial did not deprive him of the effective assistance of counsel, since the official was stationed there as a precautionary measure and his presence in no way interfered with the conferences or with his attorney's representation); see also *Fuller* v. *United States*, 407 F.2d 1199, 1212-1213 (C.A. D.C.), certiorari denied, 393 U.S. 1120; *Negrich* v. *Hohn*, 379 F.2d 213, 215 (C.A. 3).

pose of assuring its proper conduct * * *." This power to govern generally encompasses setting the order of proof (*e.g.*, *Thiede* v. *Utah Territory*, 159 U.S. 510, 519; *Nelson* v. *United States*, 415 F. 2d 483, 487 (C.A. 5), certiorari denied, 396 U.S. 1060) and taking necessary steps efficaciously to move the trial to conclusion.

There will be occasions, for example, when the trial court may find it necessary to limit the timing and length of conferences between a defendant and his attorney. The defendant has no absolute right to a recess in the trial to enable him to consult with counsel. Requests for a trial-recess are addressed to the court's discretion, and an important factor in evaluating such a request to permit consultation is the countervailing consideration that the jury's ultimate understanding of the evidence is generally facilitated by avoiding unnecessary interruptions in its introduction. See, *e.g.*, *Tasby* v. *United States*, 451 F. 2d 394, 399 (C.A. 8); *United States* v. *Perchalla*, 407 F. 2d 821, 822 (C.A. 4); *Juarez-Flores* v. *United States*, 394 F. 2d 161, 163 (C.A. 5), certiorari denied, 393 U.S. 942; *Galbraith* v. *United States*, 387 F. 2d 617, 619 (C.A. 10).

When a defendant takes the stand, defense requests for a recess to permit consultation during his testimony invoke a range of considerations not invoked by similar requests made while a non-party witness is testifying. The defendant in a criminal case has a largely unlimited right "to remain silent unless he chooses to speak in the unfettered exercise of his own

will, and to suffer no penalty * * * for such silence." *Malloy* v. *Hogan*, 378 U.S. 1, 8; cf. *Griffin* v. *California*, 380 U.S. 609. But once he has chosen to testify, he is subject to the same risks as any other witness—risks to which he would not be subject simply as a defendant.[13] He also opens the door to a searching cross-examination on matters covered in his direct examination. See, *e.g.*, *Brown* v. *United States*, 356 U.S. 148; *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316; see also *McGautha* v. *California*, 402 U.S. 183, 213-215.

This distinction between the role of a defendant and a witness/defendant is deeply rooted in the nature of the criminal trial as an adversary factfinding process. The defendant who elects to testify at trial puts his credibility in issue to the same extent as any other witness. Like any other witness, he has an affirmative obligation "to speak truthfully and accurately." *Harris* v. *New York*, 401 U.S. 222, 225; see also *United States* v. *Knox*, 396 U.S. 77; cf. *Dennis* v. *United States*, 384 U.S. 855. But the truthfulness and accuracy of his testimony requires that it be put to the acid test of cross-examination.

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[13] For example, although admissions secured from a defendant in violation of *Miranda* v. *Arizona*, 384 U.S. 436, may not be introduced by the prosecution during its case-in-chief, the witness/defendant runs a risk that the prosecution will use such admissions for impeachment purposes. *Harris* v. *New York*, 401 U.S. 222. Similarly, the defendant who testifies at trial may be impeached by proof of prior convictions. *Spencer* v. *Texas*, 385 U.S. 554, 561; cf. *Michelson* v. *United States*, 335 U.S. 469.

The importance of cross-examination to the adversary factfinding process has long been recognized. As this Court noted in *Davis* v. *Alaska*, 415 U.S. 308, 316, for example, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Indeed, "[t]here are few subjects * * * upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405; see also *California* v. *Green*, 399 U.S. 149, 158; *Greene* v. *McElroy*, 360 U.S. 474, 496.

Effective cross-examination requires that the witness personally and immediately answer questions without consulting with third parties. As pointed out in *Davis* v. *Alaska*, *supra*, 415 U.S. at 315-316 (quoting 5 Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940)):

> The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

A defendant who takes the stand is required—like all other witnesses—to give immediate and personal responses to questions put to him on cross-examination, without the opportunity to consult with counsel.

As this Court stated in *Brown* v. *United States*, 356 U.S. 148, 154, 155, the testimony of a defendant is not "freed from the antiseptic test of the adversary process" but may be probed and "assailed like that of any other witness." See also *Bronston* v. *United States*, 409 U.S. 352, 359; *Fitzpatrick* v. *United States*, *supra*, 178 U.S. at 315.

The fact that a defendant has no right to interrupt his testimony to consult with his attorney does not deny him the assistance of counsel during his examination. Counsel can fully prepare the defendant to testify before he takes the stand, can object to improper questions during cross-examination, and can attempt to rehabilitate him on redirect examination. This assistance satisfies the Sixth Amendment, which has never been viewed as according a defendant the right to absolute and unlimited consultation with his attorney during every moment of his trial. Rather, "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process * * *." *Herring* v. *New York*, *supra*, slip op., p. 5.

In the light of these considerations, it is not surprising that a number of court of appeals decisions recognize that restrictions upon a defendant's right to communicate with his attorney during the trial do not automatically require reversal of his conviction, but only where the defendant shows that the restriction prejudiced his defense. Thus in *In re Di*

Bella, 17 Crim. L. Rep. 2334 (C.A. 2, decided June 8, 1975), the court upheld the contempt conviction of a recalcitrant grand jury witness where, although his attorney had been excluded from the courtroom for a short time, the record disclosed that the witness had not suffered any resulting prejudice. In *United States* v. *Schrimsher*, 493 F. 2d 848, 854 (C.A. 5), the defendant's conviction was upheld even though his attorney was incarcerated for contempt during a luncheon recess in the trial, since there was no allegation of prejudice or basis for assuming it.

In *United States* v. *Crutcher*, 405 F. 2d 239, 244-245 (C.A. 2), certiorari denied, 394 U.S. 908, the conviction was upheld, although the defendant's attorney was instructed not to communicate with the defendant during a luncheon recess in the trial; the rationale was that the court was not informed of anything that needed to be discussed at that time. Finally, in *United States* v. *Leighton*, 386 F. 2d 822, 823 (C.A. 2), certiorari denied, 390 U.S. 1025, an order prohibiting the defendant and his attorney from consulting during a luncheon recess was harmless error since "we can discern no actual harm * * * and are convinced that there was none". Cf. *Altmayer* v. *Sanford*, 148 F. 2d 161, 162 (C.A. 5).

Indeed, the two cases upon which petitioner relies (Br. 7-11) as indicating that prejudice need not be shown actually support our contrary submission. In *Glasser* v. *United States*, 315 U.S. 60, the trial judge had appointed the same attorney to represent defend-

ants Glasser and Kretske, even though he had been informed that their defenses might be antagonistic. This Court set aside Glasser's conviction after finding that he had been prejudiced by the dual representation. It affirmed Kretske's conviction, however, since "Kretske does not contend that he was prejudiced by the appointment, and we are clear from the record that no prejudice is disclosed as to him" (*id.* at 77).

In *United States* v. *Venuto*, 182 F. 2d 519 (C.A. 3), the conviction was reversed where the trial court had prohibited an illiterate defendant and his attorney from consulting with one another during an overnight recess in a complex trial involving voluminous records. As the Second Circuit pointed out in *United States* v. *Leighton*, *supra*, 386 F. 2d at 823, however, "[t]he harm done by the ruling in those circumstances is self-evident," *i.e.*, prejudice was inherent in the particular circumstances. In both cases the touchstone for upholding or reversing the conviction was the absence or presence of prejudice.

Petitioner himself recognized that he would not have been entitled to a recess at the conclusion of his direct examination to enable him to consult with counsel concerning his cross-examination (*supra*, pp. 7-8). As the district court pointed out, the issue arose in this case only because of the fortuity that the direct examination ended when the trial recessed for the day. Particularly in these circumstances, it would be most inappropriate to hold that the prohibition upon petitioner's discussing his testi-

mony with counsel during the recess automatically requires the reversal of his conviction.[14]

B. Petitioner was not prejudiced by the district court's limitation upon his consultation with counsel during the overnight recess.

The district court did not prohibit all discussion between petitioner and counsel during the recess. To the contrary, the court expressly authorized them to consult at the beginning of the recess with respect to trial strategy and the order of witnesses (Tr. 1152-1153; App. 19). The court also stated that when the redirect examination of petitioner had been completed, counsel would have whatever time he needed to consult with petitioner "about strategies or anything else" (Tr. 1153; App. 19).

Petitioner's counsel himself recognized that he had no "right * * * to coach him as to what he may say on cross-examination or how to answer questions" (Tr. 1151; App. 18-19). Moreover, petitioner in effect concedes that he would not have been prejudiced by an order prohibiting discussion during the recess of the substance of his testimony (Pet. Br. 13):

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[14] The highest courts of three States—Illinois (*People* v. *Noble*, 42 Ill. 2d 425, 248 N.E. 2d 96), Pennsylvania (*e.g.*, *Commonwealth* v. *Vivian*, 426 Pa. 192, 231 A. 2d 301), and Mississippi (*e.g.*, *Pendergraft* v. *State*, 191 So. 2d 830)—have taken a contrary position. For the reasons stated above, we believe that those holdings are unsound. The highest court of at least one State—Michigan (*People* v. *Prevost*, 219 Mich. 233, 189 N.W. 92)—has held that a restriction such as that at issue here is proper. See also *People* v. *Miller*, 185 Cal. App. 2d 59, 8 Cal. Rep. 91, certiorari denied, 365 U.S. 568.

> Why, for example, didn't the trial judge only limit the incommunicado order to no discussion regarding the Defendant's testimony? Would not an admonition to the Defendant and his counsel to not discuss Defendant's testimony be just as effective as limiting or admonitory orders and instructions freely given by the Court to other witnesses and the jury regarding matters of law and fact at other recesses or interruptions during the course of the trial?

The district court explained that it was prohibiting any discussion apart from the conference concerning strategy because of doubt that petitioner would be able to conform to such a limitation (Tr. 1152-1153; App. 19).

In short, petitioner has not shown—and there is no basis for assuming—that the limitation upon consultation with counsel during the overnight recess prejudiced him in any way. The court expressly permitted them to discuss such matters as trial strategy at the outset of the recess and promised to make available additional time for unlimited consultation after petitioner's testimony had been completed. Petitioner's counsel and petitioner apparently both recognize that a ban on discussion of petitioner's direct testimony in anticipation of his cross-examination would have been permissible.

Moreover, this is not a close case in which consultation between petitioner and counsel beyond the strategy discussions authorized was likely to have affected the outcome. As set forth in the Statement (pp. 2-7), there was overwhelming evidence that petitioner was an active participant in a conspiracy

to import a substantial quantity of narcotics and that he possessed a substantial amount of the drug. Petitioner's defense of entrapment—upon which he primarily relied—was negated by substantial evidence of his predisposition to commit the offense and by the testimony of several persons—including co-conspirator Randy Kilgore—that petitioner was the substantial instigator of the conspiracy.

In these circumstances, the court of appeals correctly concluded that "'we can discern no actual harm'" to petitioner as a result of the disputed instruction "'and are convinced that there was none.'" (App. 39), and correctly affirmed petitioner's conviction. *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JOHN P. RUPP,
Assistant to the Solicitor General.

SIDNEY M. GLAZER,
VICTOR STONE,
LAUREN S. KAHN,
Attorneys.

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